

This is a claim for a November 16, 2005, accident and a resulting hernia and associated scarring. In the January 15, 2008, Award, Judge Avery adopted the functional impairment opinion of Dr. Daniel D. Zimmerman for the scar resulting from hernia surgery and, accordingly, awarded claimant permanent partial disability benefits for a five percent whole person functional impairment.

Respondent contends Judge Avery erred. Respondent argues the Award granting permanent partial disability benefits for a hernia conflicts with the controlling statute and case law. In short, respondent contends claimant is not entitled to receive permanent partial disability benefits for the hernia he suffered on November 16, 2005, while working for respondent. Moreover, respondent argues “there was absolutely no evidence that there was any damage to this claimant’s abdominal nerves *or any other part of his anatomy*”¹ and the Judge erred by relying upon the AMA *Guides*² as K.S.A. 44-510d, the scheduled injury statute, does not reference that book. Respondent requests the Board to reverse and remand the January 15, 2008, Award.

Claimant notes an additional issue on appeal: whether K.S.A. 44-510d(a)(22) is constitutional. Claimant asserts the statute violates the equal protection provisions of the Kansas and United States Constitutions because it makes a hernia the only type of injury specified under the Kansas Workers Compensation Act for which permanent disability compensation is not awarded. Claimant acknowledges the Board cannot decide the constitutionality of statutes and, consequently, only raises the issue to preserve it for later appeal. Claimant requests the Board to affirm the Award.

The issues before the Board on this appeal are:

1. What is the nature and extent of claimant’s disability?
2. Is claimant entitled to future and unauthorized medical benefits?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties’ arguments, the Board finds and concludes:

The parties stipulated that on November 16, 2005, claimant developed a hernia, which arose out of and in the course of his employment with respondent. Likewise, the parties agreed claimant was entitled to receive 6.43 weeks of temporary total disability benefits due to his hernia. Accordingly, this decision will not discuss the functional impairment claimant may have sustained from the hernia itself.

In late November 2005, claimant underwent surgery to repair his hernia. The principal issue in this appeal is whether the scar that resulted from claimant’s hernia

¹ Respondent’s Brief at 1, 2 (filed April 2, 2008) (emphasis added).

² American Medical Ass’n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

surgery resulted in an impairment for which claimant is entitled to receive permanent disability benefits. The abdominal scar is approximately four to five inches long and in some places one-half inch wide. Claimant testified the scar did not itch but it was hard.

The record contains the opinions from three physicians regarding claimant's functional impairment. Claimant's medical expert, Dr. Daniel D. Zimmerman, determined claimant sustained a 10 percent whole person impairment from the hernia and another five percent whole person impairment from the resulting scar. The doctor testified, in part:

Q. (Mr. Fincher) And could you give him a rating for his scar?

A.. (Dr. Zimmerman) For disfigurement the scar is worth 5 percent of the body as a whole.

Q. And why did you come up with the 5 percent?

A. Because it's a rating that's attributable to the scar residuals, it is cosmetically noticeable, and would impact on whether he would ever want to be seen in a swimsuit.

Q. You think there would be any type of irritation or itchiness?

A. Scars always have the risk of being itchy. This isn't a straight scar. He's got kind of a keloidal widened scar appearance. It isn't a neat, good scar after having had such a repair.

Q. And by keloidal, do you mean like a lump on the skin?

A. Well, it looks thickened and that's what keloidal means. The scar isn't flat.

Q. Right. And can keloids be painful?

A. Really kind of depends on their location.³

Dr. Zimmerman, who is certified as an Independent Medical Examiner, examined claimant on March 14, 2006. The doctor did not provide an impairment rating for claimant's scar in his initial report. Moreover, the doctor testified that the table he used from the *AMA Guides* to rate claimant's scar "really isn't a very good table" and that his rating was primarily based "on the fact that he could have pruritus and disfigurement --

³ Zimmerman Depo. at 6, 7.

well, he obviously has disfigurement based on the picture.”⁴ In short, the doctor concluded claimant had an ugly scar, which he described, as follows:

I think it's probably at least three-eighths of an inch wide, particularly at the upper end of it. The upper end of the scar is a half inch wide. . . . Well, approximately one inch down it's white color. It's vertical and it's raised. It's a little bit raised approximately three-quarters of an inch below that. That looks keloidal to me. What is cosmetically distracting is the wideness of the scar. It healed by secondary intention rather than primary closure. It healed by primary closure down here pretty good, but not up at the upper portion of the scar.⁵

Moreover, Dr. Zimmerman testified that he would not have rated the scar had it been small and without keloidal formations.

Respondent's medical expert, orthopedic surgeon Dr. Phillip L. Baker, examined claimant in June 2006. Dr. Baker opined that claimant did not have a keloid scar and that claimant did not have any impairment under the *AMA Guides* due to his abdominal scar. Dr. Baker believes claimant's scar is flat and that it is not a keloid scar. Moreover, according to Dr. Baker before a scar can comprise an impairment under the *AMA Guides* the scar has to be symptomatic on a regular basis. For example, the scar must be either draining, constantly itching, or painful. In addition, Dr. Baker does not believe claimant's scar is disfiguring as he explained:

It's a scar. It depends on the eye of the beholder whether it's a disfigurement. It's always there. What's there is there. . . . I have two scars on my knees longer than this man's abdominal scar. I don't consider them disfigurements, but if I pull my legs [*sic*] up, they're always there. Somebody might look at that and say that's sure weird. I wouldn't say weird. That's a disfigurement. As a surgeon I would just say that's the way it is. It's a mark that you've had something done. Disfigurement is a burn scar to me where you really do have up around your face and it's pulling your face, that kind of thing, so I --⁶

Following the parties' pretrial hearing, the Judge requested Dr. Dick Geis to evaluate claimant. The doctor's June 21, 2006, medical report does not address whether claimant's surgical scar comprises an impairment under the *AMA Guides*.

⁴ *Id.* at 9.

⁵ *Id.* at 12.

⁶ Baker Depo. at 19, 20.

The Workers Compensation Act provides that a hernia does not merit permanent disability benefits. K.S.A. 44-510d(a)(22), the scheduled injury statute, provides:

For traumatic hernia, compensation shall be limited to the compensation under K.S.A. 44-510h and 44-510i and amendments thereto, compensation for temporary total disability during such period of time as such employee is actually unable to work on account of such hernia, and, in the event such hernia is inoperable, weekly compensation during 12 weeks, except that, in the event that such hernia is operable, the unreasonable refusal of the employee to submit to an operation for surgical repair of such hernia shall deprive such employee of any benefits under the workers compensation act.

And contrary to respondent's argument, K.S.A. 44-510d does provide that the *AMA Guides* are to be used to determine the permanent impairment for purposes of that statute. K.S.A. 44-510d(a)(23) reads:

Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

Accordingly, the *AMA Guides* apply to both scheduled and non-scheduled injuries.

Claimant argues the surgical scar from his hernia surgery comprises an impairment under the *AMA Guides*. Consequently, claimant contends he is entitled to receive disability benefits for that impairment in addition to the benefits that he may be entitled to receive for the hernia. Claimant cites the *Lozano*⁷ decision in which the Kansas Court of Appeals determined an injured worker was entitled to receive permanent disability benefits for an injury to the ilioinguinal and genitofemoral nerves that this Board found to be a natural consequence of the worker's hernia. The Kansas Court of Appeals stated, in part:

By the plain language of this provision [K.S.A. 44-510d(a)(22)], an employee who suffers a hernia injury cannot collect more than temporary total disability under the method of calculating such disability under K.S.A. 44-510h and K.S.A. 44-510i.

However, the injury at issue here is no longer a hernia injury. Although the claimant originally suffered from a hernia for which he sought medical treatment, the undisputed evidence is that following the surgeries to repair the hernia the claimant suffered from nerve damage to his ilioinguinal and genitofemoral nerves. The Board specifically found the nerve injuries were a natural consequence of the hernia injury, and such finding is adequately supported by the record. Therefore, this court

⁷ *Lozano v. Excel Corp.*, 32 Kan. App. 2d 191, 81 P.3d 447 (2003).

must adopt the Board's finding. See *Mudd v. Neosho Memorial Regional Med. Center*, 275 Kan. 187, 191, 62 P.3d 236 (2003).

The nerve injuries arose out of and are related to the hernia injury and, therefore, are compensable under the Workers Compensation Act. [Citations omitted.] Yet, the nerve injuries are not the same injury as the hernia injury and are not governed by K.S.A. 44-510d(a)(22).

A close review of K.S.A. 44-510d reveals nothing to indicate that injuries to nerve tissue are scheduled permanent partial disabilities. Consequently, the Board properly turned to K.S.A. 44-510e for guidance in determining the extent of compensation to award such an injury.⁸

To borrow language from *Lozano*, a close review of K.S.A. 44-510d reveals nothing to indicate that injuries to the skin are included in the schedule. And an injury to the skin, which is the largest organ of the body, is not the same injury as the hernia. Consequently, injuries to the skin that comprise a permanent functional impairment as measured by the *AMA Guides* may entitle a worker to receive disability benefits separate and apart from the hernia.

The record includes a photograph of claimant's scar. Considering that photograph, the Board is persuaded by Dr. Zimmerman's testimony that claimant's surgical scar is somewhat abnormal, disfiguring, and comprises a five percent whole person functional impairment under the *AMA Guides*. And due to the situs of the scar, claimant is entitled to receive permanent disability benefits under K.S.A. 44-510e based upon that five percent whole person functional impairment rating.

Next, respondent and its insurance carrier argue claimant should be denied unauthorized medical benefits and future medical benefits. The Board disagrees. Under Kansas law a worker is entitled to receive additional workers compensation benefits, including medical treatment, for the natural and direct consequences of his or her work-related accident. Indeed, the Workers Compensation Act specifically provides a procedure to request and obtain additional medical treatment following a final award.⁹ And that right to future medical treatment is an important and valuable benefit under the Act. As long as there exists a potential need for medical treatment, the Board is most reluctant to extinguish the right to pursue such treatment. Accordingly, the Board concludes claimant may request additional medical benefits upon proper application to the Director. Claimant

⁸ *Id.* at 193, 194.

⁹ See K.S.A. 2005 Supp. 44-510k.

is also entitled to unauthorized medical benefits as provided by K.S.A. 2005 Supp. 44-510h(b)(2).

In short, the January 15, 2008, Award should be affirmed.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹⁰ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board affirms the January 15, 2008, Award entered by Judge Avery.

IT IS SO ORDERED.

Dated this ____ day of April, 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
John A. Bausch, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge

¹⁰ K.S.A. 2007 Supp. 44-555c(k).